

(2012) 05 GUJ CK 0029
In the Gujarat High Court

Case No : First Appeal No. 1818 of 2001 with First Appeal No. 2287 of 2010

Halar Maritime Agencies

APPELLANT

Vs

Gujarat Maritime Board

RESPONDENT

Date of Decision : 11-05-2012

Acts Referred:

Gujarat Maritime Board Act, 1981 — Section 107, 32, 37

Citation : (2012) 05 GUJ CK 0029

Hon'ble Judges : C.L. Soni, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : N.K. Majmudar, for the Appellant; Dilbur Contractor for Mr. P.R. Nanavati, for the Respondent

Final Decision : Dismissed

Judgement

Honourable Mr. Justice C.L. Soni

1. These two appeals raise common questions of fact and law. Parties in both the appeals are same. First Appeal No.1818 of 2001 is filed against judgment and decree dated 28.8.2000 passed by 2nd Joint Civil Judge (S.D.), Jamnagar in Special Civil Suit No.127 of 1987, whereby the suit filed by the appellant for recovery of Rs.8,33,528.26 ps. is dismissed. First Appeal No.2287 of 2010 is filed against the judgment and decree dated 22.2.2010 passed by 2nd Additional Senior Civil Judge, Jamnagar, whereby the suit for recovery of Rs.1,91,39,708/-is dismissed. In the first suit, it is a case of the plaintiff that the plaintiff carries on business of lightering cargo at Bedi Port, Jamnagar and for the the purpose of loading and unloading goods, it is having three barges. The defendant is a statutory Board under Gujarat Maritime Board Act, 1981 (hereinafter referred to as "the Act" for short) and the plaintiff served as an agent for lightering cargo from ships arrived at the port. The plaintiff completed lightering of cargo of 2,77,843 M.Ts. for the period from 11.3.1985 and 11.2.1987. The defendant Board has not rendered any services as far as lightering of cargo is concerned and still the defendant Board recovered an amount of Rs.7,06,386.26 ps. in the

name of prescribed charges and surcharges from the plaintiff. The defendant Board has recovered the aforesaid amount as per notification No. GMB/T-37-38/2 dated 30.1.1984. Such notification has no legal bearing and recovery of the amount from the plaintiff is not legal and valid. The plaintiff has thus become entitled to recover the above-said amount from the defendant Board.

2. The defendant Board resisted the suit by filing written statement at Exh.12, wherein it is pointed out that the suit is not maintainable, that the plaintiff is having 6 barges and is carrying regular business of lightering cargo at Bedi Port, Jamnagar, that right of carrying lighter services is vested and retained by the Port authority, private person has got no right to exercise such power of the defendant Board and if anybody wants to carry on such lightering activities, permission of the Board is required and such person is required to pay necessary charges, that plaintiff had already recovered the amount from its customers and to allow the claim of plaintiff would be unjust enrichment to the plaintiff, that the suit is barred by the provisions of Section 107 of the Act.

2.1. On the basis of the pleadings, learned Judge framed the following issues and each issue was answered as mentioned below:

(1) Whether the plaintiff proves that he is entitled to recover suit amount sum of Rs.8,33,528.26 ps. from the defendant together with interest at the rate of 18% P.A. as alleged ?

(2) What is found due ?

(3) What order and decree ?

(4) Whether amount in the name of prescribed charges and surcharges in respect of the cargo lightered by the plaintiff company has been recovered by the defendants Board from the plaintiff company ?

(5) Whether the port authority is entitled to levy the charge in respect of the cargo lightered by the plaintiff company as per rules and schedules of port charges ?

(6) Whether impugned notification No.G.M.B/T-37-38/2 dated 30.1.1984 authorized to port authorities to levy the charges in respect of the cargo lighterage by the plaintiff company ?

(7) Whether the plaintiff proves that the disputed charges are not being levied at any other ports in the guj. State except at Bedi port ? Therefore the above action of the port authority is levying the charges at Bedi port is discriminatory ?

(8) Whether the defendant proves that the plaintiff company has recovered the charges from its customers and such it has not been caused or incurred an loss or injuries in paying the charges to the port authority hence the demand or refund of charges is bad and is hit by the principles of just enrichment ?

(9) Whether the defendant proves that the suit is bad for want of notice required

u/s 107 of the G.M.B. Act ?

(10) Whether the defendant proves that the suit is time barred u/s 107 of the G.M.B. Act ?

(11) To what relief if any, the plaintiff is entitled to ?

Findings recorded by the Trial Court against each of the issues are stated below:-

Issue No. 1

negative

Issue No. 2

negative

Issue No. 3

As per issue No.12

Issue No. 4

Positive

Issue No. 5

Positive

Issue No. 6

Positive

Issue No. 7

negative

Issue No. 8

Positive

Issue No. 9

Positive

Issue No. 10

Positive

Issue No. 11

negative

Issue No. 12

As per final order

2.2. Plaintiff examined its witness Shri Navinchandra Bhanushankar Trivedi, at Exh.53 and also produced documentary evidence. On the side of the defendant Board, Shri Arvindbhai Gopalbhai Purohit was examined at Exh.144. The thrust of the claim made in the suit by the plaintiff is the challenge to the notification, under which the defendant Board recovered charges as also the defendant Board's power to recover charges without providing any services for the purpose of lightening cargo by use of the barges by the plaintiff.

2.3. In the second suit, it is the case of the plaintiff that the plaintiff is engaged in the business of activity of lightening the cargo and the plaintiff had done such activity for the period from 1.4.1987 to 31.3.1992, that surcharge from the plaintiff is recovered without providing any services, that the provision of the Act provides for providing for different services by the Board and without providing such services, as required for lightening the cargo, the defendant Board has got no authority to recover any charges from the plaintiff, that the plaintiff believes that recovery of surcharge made by the defendant Board for lightening activity of the plaintiff was on the basis of the notification bearing No. GMB-T/37-38/2 dated 30.1.1984, that such notification is illegal, unconstitutional and is invalid and at no other port, such surcharge is recovered, that the plaintiff had repeatedly requested the defendant Board to refund the amount recovered by it and lastly, legal notice dated 25.2.1993 was served for refund of the said amount. However, since it was not refunded, the suit is required to be filed, to recover an amount of Rs.1,91,39,708/-with interest at the rate of 18%.

3. The suit was resisted by the defendant Board by filing written statement at Exh.14, stating that recovery of surcharge was made on the basis of the notification, virtually the suit is for challenge to the notification and such suit is not maintainable because Civil Court has got no such jurisdiction or power to examine the legality or constitutionality of the notification, that surcharge was recovered for the period from 1987 to March 1992 and therefore, the suit is time barred, that the plaintiff has not objected any point of time during these five years, at the time of recovery of such charges, that suit is thus filed under the guise of challenge to the legality of the notification and that too after unreasonable delay, that the notification was issued by the State Government which is not made party in the suit and that therefore, the suit is barred by the principle of non-joinder of necessary party, that ordinarily, the activity of lightening the cargo is undertaken by the authority of the Board but the plaintiff was permitted to carry out such private activity through barges on certain terms and conditions and therefore, notification of 1984 was very much applicable to the plaintiff, whereunder the private party is required to pay necessary charges for doing activity of lightening through barges and it is not correct to say that the defendant Board has not been provided any services at the port, that the Board has been providing services of Jetty, godown, crane etc. and it has also been providing various other facilities and for that purpose, it has been incurring huge expenditure, that all these facilities are being available to all persons who use the port and carry on their activities in the port, that entire channel from the point

where the ship is stationed, has been cleaned and maintained by the Board, for such activity, the Board is required to provide supply and provide equipments, that the plaintiff itself has voluntarily paid surcharges and it did not take any objection at any point of time and now under the guise of challenge to the notification as being illegal or invalid or unconstitutional, the plaintiff has filed the suit.

3.1. On the basis of the pleadings, learned Judge framed the issues at Exh.16 and answered each of the issues as under:

(1) Whether the plaintiff proves that he is Entitled to Recover Rs.1,91,39,708/- with running interest at the rate of pc pa and costs from the Def. ?

(2) Whether the Def. proves that the plaintiff had voluntarily agreed to pay the "surcharge" ?

(3) Whether the Def. proves that this court has no jurisdiction to try and dispose of the suit ?

(4) Whether the Def. proves that the suit is barred by law of limitation ?

(5) Whether the Def. proves the suit is barred by non-joinder of necessary parties ?

(6) Whether the Def. proves that the suit is barred by gross delay, laches, acquiescence & estoppels ?

(7) What order & decree ?

Findings recorded by the Trial Court against each of the issues are stated below:-

Issue No. 1

Negative

Issue No. 2

Affirmative

Issue No. 3

Negative

Issue No. 4

Affirmative

Issue No. 5

Affirmative

Issue No. 6

Affirmative

As per final order

3.2. On behalf of the plaintiff, one Shri Navinchandra Bhanushankar Trivedi was examined as plaintiff witness at Exh.39 and on behalf of the defendant, one Shri Capt. S. Chaddha was examined as defendant witness at Exh.420. Both the sides produced on record the documentary evidence.

3.3. Learned advocate for the appellant Mr. N.K. Majmudar has submitted that the Court below has committed grave error in holding that the suit was barred by the provisions of Section 107 of the Act. He pointed out that on continuous cause of action, the plaintiff had filed the suit and bar of Section 107 of the Act would not come in the way of the plaintiff. Learned advocate would next contend that provisions of Sections 32 and 37 cast duty on the defendant Board to provide all services at the Port and the Board has got no power to recover any charges in absence of providing such services. He pointed out that these are the statutory obligations of the Board and if the Board has not made provision for providing services to the persons to carry on activities of transportation/ shifting of goods from ship, to the Port, then the Board cannot recover any charges without providing such services from such person. Learned advocate has further submitted that there was no case of unjust enrichment on the part of the plaintiff. He pointed out that it is a case of challenge to the authority of the defendant Board to recover charges without providing requisite facilities at the Port. He contended that if the defendant Board had illegally recovered charges from the plaintiff, the Port cannot shirk from its responsibility from refunding the amount on the ground that the plaintiff had unjustly enriched itself.

4. Learned advocate Mr. Majmudar would also contend that notification under which the Board exercised its power of recovering the lighterage charges from the plaintiff is invalid and unconstitutional, as such notification was issued without providing any services by the Board under the provisions of the Act itself. He, therefore, submitted that the Board was not authorized to levy and collect charges from the plaintiff in respect of the lighterage of cargo by the plaintiff. He submitted that if the defendant Board had unauthorisedly and under unconstitutional and illegal notification recovered the charges from the plaintiff, then the Board is bound to refund the amount of charges. He, therefore, submitted that learned Judge has committed grave error in holding that the Board was authorised to recover charged on the basis of the notification.

4.1. In response to the above said arguments advanced by learned advocate Mr. Majmudar, learned advocate Ms. Dilbur Contractor for Mr. P.R. Nanavati for the respondent submitted that the plaintiff was not acting on behalf of the ship owner or owner of the goods brought in the ship, simply to facilitate such owner without any charges to bring the goods from the ship to the Port. She submitted that the plaintiff is a businessman dealing in lightering of cargo by using his barges for the purpose of loading and unloading of goods from the ship by taking

necessary charges from the persons whose cargo is to be loaded and unloaded and to be brought to the Port.

5. She would contend that the plaintiff being an independent agency working for lightering of cargo by charging the amount for such services, the plaintiff makes profit from such activity by using its barges in the Port area. The plaintiff thus cannot complain about the recovery of requisite charges under the notification by the defendant Board.

5.1. She would next contend that recovery of the charges by the defendant Board is under notification dated 30.1.1984, which was issued by exercising the powers by the State Government u/s 37 of the Act, whereunder, the defendant Board is authorized to charge for the services, including the service of barges for lightering the cargo and also for recovery of the charge from the private operator who wants to provide such facility. She pointed out that for services of lightering cargo, defendant Board has fixed its own rates whereas for providing services of lightering cargo by private agency, the Board provided rates as per the notification which are less than the charges for the facility of lightering cargo, being carried on by the Board itself. She, therefore, submitted that the plaintiff had been profiteering by doing business of lightering cargo with its own barges by recovering the charges fixed by the plaintiff with its own customers and whatever charges the plaintiff was required to pay, a small portion of such amount is recovered by the plaintiff from its customers. The plaintiff has already recovered such charges from its customers and paid without any objection all throughout to the defendant Board. She has further contended that the plaintiff from the beginning knew about the notification of 1984 providing for recovery of the lighterage charges by private agency and has never objected to the Board of such charges to the defendant Board. She submitted that after having paid the lighterage charges under the notification for long period of more than 5 years without any protest, the plaintiff would be estopped from claiming refund of such amount by way of filing suit in the court of law.

5.2. She has further submitted that the suit of the plaintiff is also barred by the provisions of Section 107 of the Act. She submitted that the plaintiff never issued notice u/s 107 of the Act and the suit of the plaintiff being filed after a period of six months from the date of recovery of the charges from the plaintiff, the suit is barred by the provisions of Section 107 of the Act. She would contend that the defendant Board has adduced enough evidence to establish that all necessary services and facilities have been provided at the Port and the defendant Board has discharged all its functions at the Port. She, therefore, submitted that the plaintiff has not adduced any evidence to establish as to which services the Board has not provided as required to be provided by the Board at the Port. She would last contend that it is not open for the plaintiff to challenge the notification in the suit as the Civil Court is competent to decide the private civil rights between the parties and not competent to decide the question as regards unconstitutionality or otherwise of the notification. She however, submitted that

the notification which was issued, was issued by exercising the powers under the provisions of the Act and such notification is constitutionally valid and the plaintiff has miserably failed to establish as how and on what count, the notification was bad in law or unconstitutional. She would thus submit that the plaintiff having failed to bring home any of the points raised in the appeals, the appeals filed by the plaintiff before this Court are required to be dismissed.

5.3. Having considered the rival contentions of the learned advocate for the parties and having gone through the record of the case, including the evidence led by both the parties, we are of the opinion that learned Judge has not committed any error in dismissing the suits of the plaintiff. From the rival contentions raised by the parties, following two points arise for our consideration, viz.

(1) Whether is it open to the plaintiff to claim refund of the amount of lighterage charges paid by it under the notification dated 30.1.1984 on the ground that the defendant Board was not authorized to recover lighterage charges under the said notification without providing any services at Bedi Port ?

(2) Whether the plaintiff having worked as independent businessman for the activity of lightering cargo in the Port area under the permission/ licence granted by the defendant Board and having paid necessary charges under the notification at Exh.52, without any objection at any point of time, is it open to the plaintiff to ask for refund of such charges on the ground that the notification is illegal, invalid and unconstitutional and the Board is not authorized to recover lighterage charges under the said notification ?

6. Plaintiff has examined its witness Shri Navinchandra Bhanushankar Trivedi, who was the same witness in both the suits. This witness has stated that in the first suit, surcharge was paid for the activity of lightering cargo from 1985 to 1987 and in the second suit, the period is from 1987 to 1992. The activity for both the periods was the same lightering activity, for loading and unloading of cargo from steamer to Port through barges. It is further stated by this witness that for handling cargo by the plaintiff, no services were provided by the defendant Board, still the defendant Board recovered surcharges from the plaintiff. The plaintiff had to pay the said surcharge to the defendant Board under compulsion because if such surcharge was not paid then, the Board would not have granted permission to carry on activity of lightering of cargo. It is further stated that for use of the private barges, the Board recovers such surcharges whereas if the Government barges are used, no such surcharge is recovered. It is also stated that the plaintiff has not recovered any charges from the buyers/ customers which was required to be paid to the defendant Board. The Board had no authority to issue notification dated 30.1.1984 and made recovery of charges under the said notification. The Board is not authorized to recover such surcharge under such notification for any service for the purpose of lightering cargo by using barges by the plaintiff. This witness in the cross-examination, stated that the Board itself provided services of lighterage cargo at a less rate.

He has further stated that it is not correct to say that the Board recovered charge by applying force. He stated that the Board had granted permission to the plaintiff for lightering activity and charges were recovered under the notification. He has stated that the Board has not provided any extra facility to the plaintiff. He has stated that it is not correct that the notification dated 30.1.1984 was legally issued and under such notification, the Board is entitled to recover any charges. In the similar way, in the second suit, this very witness has deposed almost in the same manner. He has repeated his same tune to the effect that the notification dated 30.1.1984 is totally illegal and the Board has got no power to issue such notification and surcharge recovered under the said notification is without any authority of law. He has stated that such lighterage charges are not being recovered at any other Port. He has also stated in the second suit that the Board without providing necessary facilities, is not entitled to recover surcharge, by taking shelter of the notification.

7. On the side of the defendant, in the first suit, one Shri Arvindbhai Gopalbhai Purohit was examined as defendant witness. He has stated that the Board is authorized to levy and recover surcharge under the notification dated 30.1.1984. He has in detail, stated about various services provided by the defendant Board at the Port. This witness has stated that the Board itself provides barges, godowns, platforms, equipments for showing directions and various other facilities and therefore, the Board is entitled to levy charges on private operators who indulged into lightering activities in the Port area. Private operators are required to take permission of the Board and are required to pay charges at the rates fixed by the defendant Board. This witness in cross-examination, has stated that from the private lightering operators, charges as per the prescribed rates are recovered by the defendant Board as the Board is providing various kinds of facility. He has further stated that private operators are required to take licence and is required to pay necessary charges for the same and it is not correct that charge recovered from the plaintiff was illegally recovered.

8. In the second suit, on behalf of the defendant, one Shri Capt. S. Chaddha was examined. He has, in detail, stated that the defendant Board has provided various types of facility at the Port, jetty at Port was made at the expenses of crores of rupees. The Board has also laid long channel for the purpose of facilitating and bringing of goods from the ship to the Port in the navigation channel. Board has also provided all other facilities, which have been maintained by incurring huge expenses. Board has also been providing facility of godown for the purpose of lightering of cargo and those persons who want to use their barges, for the purpose of lightering cargo, they are required to pay necessary charges under the notification. This witness has further stated that the Board has also been incurring huge expenses in keeping the entire canal cleaned. It has also been incurring lot of expenses in providing the facility of platform for the purpose of transporting the goods from vessel to Port by using barges. This witness has stated that the plaintiff has paid charges under the notification and the plaintiff was very much aware from the beginning about the existence of

such notification and the plaintiff has not taken any objection at any point of time regarding such charges by the Board under the notification. He has also stated that the plaintiff took permission and continued its activity of lightering cargo for the period right from 1987 to 1992 and he has paid necessary charges without any protest.

8.1. Having scanned through the evidence of the witnesses of both the sides in the context of the rival contentions raised by both the parties, we find that the plaintiff has miserably failed in establishing that the Board has not provided any facility or services at the Port. In fact, it is not possible to believe that such a defendant Board, which is a statutory Corporation and which is responsible to maintain and handle many activities at the Port and being responsible to discharge various kinds of obligation under the Act, will not be providing kinds of facility required at the Port. Except the bare assertion by the plaintiff and its witness orally before the Court, the plaintiff has not produced any other evidence to show that the defendant Board has not provided any kind of services, especially in connection with lightering of cargo. As against the oral assertion of the plaintiff and its witness, the defendant witnesses in both the suits have in detail stated what kind of facilities the defendant was providing. Witnesses of the defendant Board have stated that the Board itself, amongst other facilities, is also providing lightering services through its barges to vessel/ ship in the Port area. It has made channel for this very purpose and also for connected purposes. For providing services of lightering of cargo, the Board has been recovering charges as per the rates prescribed by it. These two witnesses of the Board have further stated that if any private person wants to do activity of lightering of cargo, such person is permitted by licence on payment of necessary charges to do such activity, which is called as "lighterage charge" under notification dated 30.1.1984. These witnesses have stated that the plaintiff has taken permission and licence to provide such facilities of lightering of cargo by way of business and had paid necessary charges under the notification to the Board for continuous period from 1985 to 1992. The plaintiff having undertaken private lightering activity has paid necessary charges under the notification, it is not permissible to it to challenge recovery under guise of challenging notification.

9. We find that it is not open to the plaintiff to raise any contention about the Board having not provided any services or facilities when the defendant Board recovered charges from the plaintiff under the notification. In fact, from the evidence on record, it clearly appears that the plaintiff had knowledge about the notification from the very beginning and the plaintiff took conscious decision of obtaining permission and licence from the Board to indulge into the business activity of lightering cargo as an independent body. The plaintiff in fact paid necessary charges under the above-said notification for number of years. We also find that the plaintiff carried on lightering activities purely for its customers. It is not believable that a person, like the plaintiff, doing activity of lightering cargo for others, would not charge and make any profit from its customers. Therefore, if the plaintiff has taken permission and undertaken private activities

of lightering cargo and has bound itself to pay necessary charges under the notification and if the plaintiff knew very well that it could not have undertaken such activity without taking permission or licence from the defendant Board, it is not open to the plaintiff now to contend that the Board has no authority under the notification to recover lighterage charges by taking varying stand that the Board cannot recover such charges without providing any facility or services at the Port.

10. We have already discussed above that the plaintiff has failed to prove that the Board has not provided any facility or services and on the other hand, the defendant witnesses have proved to a great extent that the defendant Board has provided all services and facilities at the Port, as required to be provided under the Act. We also find that the plaintiff could not maintain the suits without serving notice u/s 107 of the Act and beyond time limit prescribed under the provisions of the said Section. In our view, the plaintiff had filed the suits beyond the period of limitation. Cause of action for the first suit had arisen when the plaintiff had started paying charges in the year 1985 and still the suit was filed in the year 1987, on the ground that the cause of action was continuous one from 1985 to 1987. Similarly, the plaintiff has tried to bring the second suit within the time limit on the ground that the charges were being paid from 1987 to 1992 and it was also a continuous cause of action. We are of the view that under the guise of continuous cause of action, the plaintiff is not entitled to bring the suit beyond limitation provided u/s 107 of the Act. Thus, the plaintiff having not fulfilled the requirement of issuing notice and time limit u/s 107, suits were otherwise barred by the provisions of Section 107 of the Act. We are also of the view that the plaintiff was otherwise not entitled to challenge the validity of the notification dated 30.1.1984. The plaintiff having once agreed to pay necessary lighterage charges and having all through out paid such charges, it is not open to the plaintiff to challenge the notification. We also find that the plaintiff having obtained permission and licence to operate as lightering agent, the plaintiff is estopped from claiming refund of the amount of the charges paid by it without raising any objection at any point of time. We, therefore, concur with the findings and conclusions recorded by the learned Judge and do not find any reason to interfere with the judgment and decree passed by the learned Judges. The appeals are required to be dismissed and they are dismissed accordingly.